

TTAB

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,)	
)	
Petitioner,)	
v.)	Cancellation No. 41,776
)	
PAVE TECH, INC.,)	
)	
Registrant.)	

**CATERPILLAR'S REPLY IN SUPPORT
OF ITS MOTION FOR EXTENSION OF DISCOVERY
AND TESTIMONY PERIODS**

I. INTRODUCTION

Instead of arguing why Caterpillar's Motion for Extension of Discovery and Testimony Periods should not be granted, Pave Tech asserts several baseless excuses for its failure to serve any deposition notices until the end of discovery and its renegeing of an agreement to extend the discovery schedule. Based upon these excuses, Pave Tech claims that the discovery schedule should not be extended because Pave Tech gave reasonable notice for its depositions but that Caterpillar's notices of depositions were "unnecessary and untimely." First, Pave Tech has no excuse for its failure to serve its first deposition notices until after a year of discovery. Pave Tech claims that it delayed in serving its notices of depositions because Caterpillar did not timely send Pave Tech a settlement proposal it allegedly promised to send in February, 2004. Waiting for a settlement proposal does not excuse Pave Tech's delay in filing its deposition notices. Moreover, Pave Tech attempts to excuse its refusal to extend the discovery period by claiming that the depositions requested by Caterpillar were unnecessary and untimely. Neither is true.

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06-03-2004

U.S. Patent & TMO/TM Mail Rcpt 06-03-2004

Certificate of Mailing
I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington Virginia 22202-3514 on June 1, 2004.

Since both parties need the extension to conduct discovery, Caterpillar requests that the Board grant its Motion for Extension of the Discovery and Testimony Periods.

II. ARGUMENT

A. It was not reasonable for Pave Tech to delay serving its first deposition notices until two weeks before the end of discovery and then to refuse to extend the discovery period.

Discovery in this action opened on April 11, 2003. Exhibit A, Order opening Discovery. Over one year after that date, Pave Tech served its first deposition notices. Exhibit B, Pave Tech Deposition Notices. Pave Tech claims that it delayed serving its deposition notices because Caterpillar's attorney allegedly stated on February 23, 2004 that it would send a settlement proposal "shortly". Response, p. 2-3. Caterpillar, however, never stated that it would send a settlement proposal "shortly." Caterpillar's attorney told Pave Tech that it intended to send a settlement proposal after receiving and reviewing the transcripts from both Mr. Jones' deposition on February 23 and Mr. Cramer's deposition on February 24th. Exhibit C, Dec. of Mary Innis. Caterpillar did not receive these transcripts until well into March and then Caterpillar still had to review the transcripts. Moreover, Pave Tech's counsel indicated that he did not want to discuss settlement until he had a chance to review the deposition transcripts. See Exhibit C, Dec. of Mary Innis.

Even if Caterpillar had stated that it would send the settlement proposal "shortly," Pave Tech cannot rely upon that statement as an excuse for failing to serve its deposition notices until the eleventh hour of discovery. Since Caterpillar did not allegedly assert that it would be sending the settlement agreement until 10 months after discovery started, this excuse does not explain Pave Tech's initial delay in serving the deposition notices.

Moreover, Caterpillar's willingness to consider settlement options does not excuse Pave

Tech's failure to immediately serve the depositions after Caterpillar's initial depositions on February 23rd -24th. If Pave Tech intended to depose any of Caterpillar's witnesses after Caterpillar's initial depositions, it still had to give Caterpillar reasonable notice of those depositions pursuant to Fed. R. Civ. P. 30. Pave Tech did not give Caterpillar such notice. The "reasonableness" requirement under Rule 30 "must be determined in light of the facts and circumstances of the individual case." *Davidson v. Dean*, 204 F.R.D. 251 (S.D.N.Y. 2001). Based upon the facts and circumstances in this case, Pave Tech did not give Caterpillar reasonable notice for several reasons. First, even though discovery had been on-going for over a year, Pave Tech failed to give Caterpillar any written notice of the upcoming depositions until April 21st over a year after discovery opened and with only two weeks remaining in discovery. Exhibit C, Dec. of Mary Innis. Pave Tech had no reason for waiting a year and then demanding that Caterpillar produce at least three witnesses with only two weeks notice. Second, it would have been impossible for the parties to complete the depositions before the end of discovery because the requested depositions would have required more than three deponents and would have spanned over multiple states. Pave Tech's notice requested the deposition of a witness in Minneapolis, a witness in Peoria and a 30(b)(6) deposition on the three consecutive days before the end of discovery. Because of the breadth of the twenty-eight 30(b)(6) deposition topics, Caterpillar would have had to identify multiple witnesses to cover all of these topics. It is very possible that not all of these witnesses would be located in Peoria. In fact, one of the witnesses may be located in Texas. Exhibit C, Dec. of Mary Innis. Therefore, it was not reasonable for Pave Tech to expect Caterpillar to produce at least 5 witnesses in three different states in the last three days of discovery with only two weeks notice after over a year of discovery.

Third, Pave Tech knew that its request to depose these witnesses on such short notice was

not reasonable. That is why Pave Tech offered in the e-mail accompanying the notices of deposition to reschedule to deposition dates. Exhibit D, April 21st Pave Tech e-mail. Fourth, Pave Tech's later refusal to reschedule these depositions or to extend the discovery period compounded any scheduling problems and is an additional reason why Pave Tech's notice was unreasonable. *See* Exhibit E, Declaration of Nerissa Coyle McGinn.

Because Pave Tech did not give reasonable notice to Caterpillar of the depositions, Caterpillar was forced to request a protective order from the Court. In addition, Caterpillar filed its Motion for Extension of the Discovery and Testimony Periods since Pave Tech would not agree to an extension. Caterpillar anticipates that both Pave Tech and Caterpillar will take depositions during this extension period. Therefore, since both parties intend to take depositions during the extension period, the Board would not prejudice either party by extending the discovery and testimony periods.

B. Caterpillar's deposition notices were necessary.

Pave Tech attempts to justify its refusal to extend the discovery period by claiming that the depositions of Glenn Wroblewski and Dale Sopkowiak were "admittedly unnecessary" and "retaliatory in nature." Response, p. 5. Both of these claims are false. First, Pave Tech bases its argument that the depositions were unnecessary on Caterpillar's April 28th settlement proposal letter. In that letter, Caterpillar stated that "Caterpillar believes that the [February 23 and 24] deposition testimony established that there is a likelihood of confusion." Exhibit F, April 28 Caterpillar letter. This statement does not admit that the requested deposition testimony was unnecessary. In fact, the deposition testimony of Glenn Wroblewski and Dale Sopkowiak could be essential to Caterpillar's case. Both of these witnesses were identified as people who

had direct contact via telephone and at trade shows with consumers who possibly could be confused between the Caterpillar Marks and the PAVERCAT mark. Exhibit C, Dec. of Mary Innis. This type of actual confusion evidence could be the lynch pin in Caterpillar's case and therefore cannot be deemed by Pave Tech as "unnecessary."

Second, Caterpillar's request for these depositions was not retaliatory. Pave Tech incorrectly claims that Caterpillar first requested these depositions after Pave Tech served its notice of depositions. This is not true. At the February 23-24 depositions – almost two months before Pave Tech served its notices of depositions - Caterpillar told opposing counsel that it intended to take the depositions of Glen Wrobeleski and Dale Sopkowiak. Exhibit C, Dec. of Mary Innis. Moreover, since that time Caterpillar consistently conveyed to opposing counsel that Caterpillar intended to take these noticed depositions if the parties did not reach a settlement of this matter in the interim. Therefore, Pave Tech has long had notice of Caterpillar's intent to take the noticed depositions and in no way were the requests for these depositions in response to Pave Tech's deposition notices.

C. Caterpillar's deposition notices were timely.

Pave Tech argues that Caterpillar's deposition notices were not timely. As set forth more fully in Caterpillar's Motion for Extension of the Discovery and Testimony Periods, Pave Tech reneged on its agreement to extend the discovery period. Based upon its telephone conference with Pave Tech, Caterpillar believed that Pave Tech had already agreed to a 30 day extension of the discovery period when it served its deposition notices. *See* Exhibit E, Dec. of Nerissa Coyle McGinn. Based upon that belief, Caterpillar noticed up the two depositions during the agreed upon 30 day extension period. Thus, Caterpillar properly noticed these depositions within the 30

day extension period. If Pave Tech had not reneged on its agreement, then Caterpillar's deposition notices would have been timely.

Pave Tech claims that it never agreed to the 30 day extension of the discovery period. To support that claim, Pave Tech attached two declarations describing attorney-client communications *to which Caterpillar was not privy*. Pave Tech's instructions to its attorney are not relevant. Whether or not Pave Tech's counsel had permission to agree to a 30 day extension of the discovery period, Pave Tech's counsel communicated to Caterpillar that it would agree to the extension and Caterpillar timely noticed the depositions accordingly. It is pointless for Pave Tech to refute the fact that it agreed to a 30 day extension with conversations and instructions to which Caterpillar had no knowledge.

III. CONCLUSION

Because Pave Tech has no excuse for its refusal to extend the discovery period and because neither party has finished with taking discovery, Caterpillar respectfully requests that the Board grant Caterpillar's Motion for Extension of Discovery and Testimony Periods.

Dated: June 1, 2004

LOEB & LOEB LLP

By: 

Mary E. Innis

Nerissa Coyle McGinn

200 South Wacker Drive, Suite 3100

Chicago, Illinois 60606

Telephone: (312) 674-4780

Facsimile: (312) 674-4779

CERTIFICATE OF SERVICE

I, Nerissa Coyle McGinn, hereby certify that I caused a copy of the foregoing **CATERPILLAR'S REPLY IN SUPPORT OF ITS MOTION FOR EXTENSION OF DISCOVERY AND TESTIMONY PERIODS** to Michael J. O'Loughlin, Micheal J. O'Loughlin & Associates, P.A., 400 South 4th Street, 1012 Grain Exchange Building, Minneapolis, Minnesota 55415 and Rebecca Jo Bishop, Altera Law Group LLC, 6500 City West Parkway, Suite 100, Minneapolis, MN 55344, via first class mail, postage prepaid on June 1, 2004.

A handwritten signature in black ink, appearing to read "Nerissa Coyle McGinn", written over a horizontal line.

**UNITED STATES PATENT AND TRADEMARK
OFFICE**

Trademark Trial and Appeal Board

2900 Crystal Drive
Arlington, Virginia 22202-3513

A

Mailed: March 22, 2003

Pave Tech, Inc.

15354 Flag Avenue P.O. Box 576
Prior Lake, MN 55372

Cancellation No. 92041776

Reg. No. 2684138

NERISSA COYLE MCGINN
PATTISHALL, MCAULIFFE, NEWBURY, HILLIARD & GERALDSON
311 SOUTH WACKER DRIVE - SUITE 5000
CHICAGO, IL 60606

CATERPILLAR INC.

V.

Pave Tech, Inc.

LATRICIA HARRISON, LEGAL ASSISTANT:

A petition, a copy of which is attached, has been filed to
cancel the above-identified registration.

Proceedings will be conducted in accordance with the
Trademark Rules of Practice.

ANSWER IS DUE FORTY DAYS after the mailing date hereof.
(See Patent and Trademark Rule 1.7 for expiration date
falling on Saturday, Sunday or a holiday).

Proceedings will be conducted in accordance with the
Trademark Rules of Practice, set forth in Title 37, part 2,
of the Code of Federal Regulations. The parties are
reminded of the recent amendments to the Trademark Rules
that became effective October 9, 1998. See Notice of Final
Rulemaking published in the *Official Gazette* on September
29, 1998 at 1214 TMOG 145. Slight corrections to the
rules, resulting in a correction notice, were published in
the *Official Gazette* on October 20, 1998 at 1215 TMOG 64.

EXHIBIT

A

A copy of the recent amendments to the Trademark Rules, as well as the *Trademark Trial and Appeal Board Manual of Procedure* (TBMP), is available at <http://www.uspto.gov>.

Discovery and testimony periods are set as follows:

Discovery period to open:	April 11, 2003
Discovery period to close:	October 08, 2003

30-day testimony period for party in position of plaintiff to close:	January 06, 2004
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30-day testimony period for party in position of defendant to close:	March 06, 2004
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15-day rebuttal testimony period for plaintiff to close:	April 20, 2004
--	----------------

A party must serve on the adverse party a copy of the transcript of any testimony taken during the party's testimony period, together with copies of documentary exhibits, within 30 days after completion of the taking of such testimony. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

NOTE: The Board allows parties to utilize telephone conferences to discuss or resolve many interlocutory matters that arise in inter partes cases. See the *Official Gazette* notice titled "Permanent Expansion of Telephone Conferencing on Interlocutory Matters in Inter Partes Cases Before the Trademark Trial and Appeal Board," 1235 TMOG 68 (June 20, 2000). A hard copy of the *Official Gazette* containing this notice is available for a fee from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 (Telephone (202) 512-1800). The notice is also available at <http://www.uspto.gov>. Interlocutory matters which the Board agrees to discuss or decide by phone conference may be decided adversely to any party which fails to participate.

If the parties to this proceeding are also parties to other Board proceedings involving related marks or, during the pendency of this proceeding, they become parties to such proceedings, they should notify the Board immediately, so that the Board can consider consolidation of proceedings.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,

Petitioner,

v.

PAVE TECH, INC.,

Registrant.

Cancellation No. 41,776

NOTICE OF DEPOSITION


PLEASE TAKE NOTICE that, on May 3, 2004, commencing at 9:30 a.m. and continuing until completed, Registrant, Pave Tech, Inc., will depose on oral examination Terry G. Sharp of Caterpillar Paving Products, Inc., a subsidiary of Caterpillar, Inc., located at 9401 85th Avenue North, Brooklyn Park, Minnesota 55445. The deposition will be held at the offices of Altera Law Group, LLP located at 6500 City West Parkway, Suite 100, Eden Prairie, MN 55344, or at such other place and time as counsel may agree. The deposition will take place pursuant to the Federal Rules of Civil Procedure before a notary public or before some other officer authorized by law to administer oaths by the laws of the United States or of the place where the examination is held, with such adjournments as to time and place as may be necessary. Counsel for Caterpillar is invited to attend and cross-examine.

Respectfully submitted,

PAVE TECH, INC.

By its attorneys,

Dated: April 21, 2004


Rebecca Jo Bishop (MN Bar No. 298,165)
Karen D. McDaniel (MN Bar No. 194,554)
ALTERA LAW GROUP
6500 City West Parkway



Suite 100
Eden Prairie, MN 55344
Telephone: (952) 253-4100
Fax: (952) 912-0574

Michael J. O'Loughlin (MN Bar No. 81,607)
MICHAEL J. O'LOUGHLIN & ASSOC, P.A.
400 South 4th Street
1012 Grain Exchange Building
Minneapolis, MN 55415
Telephone: (612) 342-0351
Fax: (612) 342-2399

CERTIFICATE OF SERVICE

I, Rebecca J. Bishop, hereby certify that on this 21st day of April, 2004, a true and correct copy of the foregoing document, NOTICE OF DEPOSITION, was served via e-mail delivery and first class mail postage prepaid on:

Mary E. Innis
Nerissa Coyle McGinn
LOEB & LOEB LLP
200 South Wacker Drive
Suite 3100
Chicago, Illinois 60606
(312) 674-4780
minnis@loeb.com
nmcginn@loeb.com


Rebecca J. Bishop

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 41,776
)	
PAVE TECH, INC.,)	
)	
Registrant.)	
)	

NOTICE OF DEPOSITION


PLEASE TAKE NOTICE that, on May 4, 2004, commencing at 9:30 a.m. and continuing until completed, Registrant, Pave Tech, Inc., will depose on oral examination Gene Bolmarcich, Caterpillar's Senior Intellectual Property Attorney, Caterpillar, Inc. located at 100 Northeast Adams Street, Peoria, IL 61602. The deposition will be held at the offices of Howard & Howard Attorneys, P.C., One Technology Plaza, Suite 600, 211 Fulton Street, Peoria, Illinois 61602-1350, or at such other place and time as counsel may agree. The deposition will take place pursuant to the Federal Rules of Civil Procedure before a notary public or before some other officer authorized by law to administer oaths by the laws of the United States or of the place where the examination is held, with such adjournments as to time and place as may be necessary. Counsel for Caterpillar is invited to attend and cross-examine.

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PAVE TECH, INC.

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Dated: April 21, 2004


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Mary E. Innis
Nerissa Coyle McGinn
LOEB & LOEB LLP
200 South Wacker Drive
Suite 3100
Chicago, Illinois 60606
(312) 674-4780
minnis@loeb.com
nmcginn@loeb.com


Rebecca J. Bishop

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 41,776
)	
PAVE TECH, INC.,)	
)	
Registrant.)	
)	

NOTICE OF RULE 30(b)(6) DEPOSITION

PLEASE TAKE NOTICE that, on May 5, 2004, commencing at 9:30 a.m. and continuing until completed, Registrant, Pave Tech, Inc., will depose on oral examination Caterpillar, Inc. ("Caterpillar") located at 100 Northeast Adams Street, Peoria, IL 61062, on the topics set forth in attached Schedule A. The deposition will be held at the offices of Howard & Howard Attorneys, P.C., One Technology Plaza, Suite 600, 211 Fulton Street, Peoria, Illinois 61602-1350, or at such other place and time as counsel may agree.

Caterpillar is instructed to designate one or more witnesses most familiar with each category who will testify about each category, on Caterpillar's behalf, pursuant to Federal Rule of Civil Procedure 30(b)(6). Caterpillar is requested to provide and have available all documents previously called for production by Registrant to the extent not previously produced, specifically including but not limited to item 18 in Schedule A.

The deposition will take place pursuant to the Federal Rules of Civil Procedure before a notary public or before some other officer authorized by law to administer oaths by the laws of the United States or of the place where the examination is held, with such adjournments as to

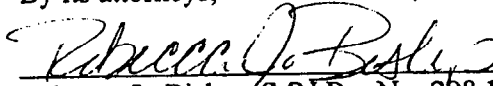
time and place as may be necessary. Counsel for Caterpillar is invited to attend and cross-examine.

Respectfully submitted,

PAVE TECH, INC.

By its attorneys,

Dated: April 21, 2004



Rebecca Jo Bishop (MN Bar No. 298,165)

Karen D. McDaniel (MN Bar No. 194,554)

ALTERA LAW GROUP

6500 City West Parkway

Suite 100

Eden Prairie, MN 55344

Telephone: (952) 253-4100

Fax: (952) 912-0574

Michael J. O'Loughlin (MN Bar No. 81,607)

MICHAEL J. O'LOUGHLIN & ASSOC, P.A.

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1012 Grain Exchange Building

Minneapolis, MN 55415

Telephone: (612) 342-0351

Fax: (612) 342-2399

SCHEDULE A

1. The business of Petitioner, "Petitioner" hereinafter referring inclusively to Caterpillar, Inc., its predecessors in interest, any parent entities, its subsidiaries and related organizations and the officers, directors, employees, agents and representatives thereof, collectively referred to as "Petitioner";
2. The marks of Petitioner, hereinafter defined as those trademarks, service marks and design marks alleged in the Notice of Opposition, collectively referred to as "the Caterpillar marks";
3. Petitioner's efforts to seek federal trademark and/or service mark protection for the Caterpillar marks and the present status of each such registration and application for the Caterpillar marks.
4. The use in commerce of the Caterpillar marks;
5. The goods and services on which the Caterpillar marks are used;
6. The advertising, marketing and promotion of all of Petitioner's products or services sold in connection with the Caterpillar marks.
7. The marketplace in which Petitioner's goods and services under the Caterpillar marks are marketed and sold, including channels of trade, how sales are made, the purchase decision, and delivery of the goods or services;
8. The current, prior and potential customers of Petitioner who purchase goods or services sold under the Caterpillar marks;
9. Industry trade shows, conventions and seminars attended by Petitioner;
10. Memberships held by Petitioner in industry organizations;
11. Petitioner's Pneumatic Cat Lift machine;
12. Petitioner's compact equipment;
13. Petitioner's skid steer loader equipment;
14. Any of Petitioner's products or services that Petitioner contends is similar to or performs the functions of Registrant's PAVERCAT equipment;
15. The paving industry, including but not limited to asphalt paving, general information about the marketplace of the paving industry, Petitioner's goods and services under the Caterpillar marks offered in the paving industry and the like;

16. The landscaping industry, general information about the marketplace of the landscaping industry, Petitioner's goods and services under the Caterpillar marks offered in the landscaping industry and the like;
17. The segmental paver industry, general information about the marketplace of the segmental paver industry, Petitioner's involvement or promotional activities in the segmental paver industry, including goods or services offered under the Caterpillar marks used in connection with the segmental paver industry, and the like;
18. The development, placement and removal of content on Petitioner's web site;
19. Any research, survey, trademark search, test, poll, interview, study or investigation related to Registrant, the mark PAVERCAT, or the Caterpillar marks, or relating to third-party trademarks or service marks incorporating in whole or in part the word CAT, either as a free standing designation or joined with other terms in a composite expression;
20. Petitioner's knowledge of third-party use, registration or application to register names, marks or terms which are composed in whole or in part of the word CAT or are or may be confusingly similar to or dilutive of the Caterpillar marks or the mark PAVERCAT;
21. Any of Petitioner's prior or current assertions of trademark rights against third parties regarding the Caterpillar marks, including past or current enforcement actions, oppositions, cancellations, state or federal lawsuits, settlement agreements and the like;
22. Registrant's use of the PAVERCAT mark;
23. The factual basis for Petitioner's allegation that there is a likelihood of confusion, mistake or deception caused by the co-existence of the Caterpillar marks and Registrant's mark PAVERCAT;
24. The factual basis for Petitioner's allegation that the registration of the trademark PAVERCAT is and will continue to be damaging to Petitioner;
25. All claimed instances of actual confusion, if any, caused by the co-existence of the Caterpillar marks and Registrant's mark PAVERCAT;
26. Any facts on which Petitioner intends to rely to support a contention that Petitioner sells equipment that performs the same functions as Registrant's PAVERCAT equipment;
27. Any facts on which Petitioner intends to rely to support a contention that Petitioner sells equipment in the same channel of trade in which Registrant sells its PAVERCAT equipment;

28. Identification and authentication of all documents produced in response to Registrant's discovery requests.

CERTIFICATE OF SERVICE

I, Rebecca J. Bishop, hereby certify that on this 21st day of April, 2004, a true and correct copy of the foregoing document, NOTICE OF RULE 30(b)(6) DEPOSITION, was served via e-mail delivery and first class mail postage prepaid on:

Mary E. Innis
Nerissa Coyle McGinn
LOEB & LOEB LLP
200 South Wacker Drive
Suite 3100
Chicago, Illinois 60606
(312) 674-4780
minnis@loeb.com
nmcginn@loeb.com


Rebecca J. Bishop

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CATERPILLAR INC.,)	
)	
Petitioner,)	
v.)	Cancellation No. 41,776
)	
PAVE TECH, INC.,)	
)	
Registrant.)	

DECLARATION OF MARY E. INNIS

1. I am an attorney with Loeb & Loeb LLP, 200 South Wacker, Suite 3100, Chicago, Illinois 60606, counsel of Petitioner, Caterpillar Inc. ("Caterpillar"). I am one of the lawyers primarily responsible for the above captioned matter on Caterpillar's behalf. In such capacity, I submit this affidavit in support of Caterpillar's Reply in Support of its Motion for Protective Order, Reply in Support of its Motion for Extension of the Discovery and Testimony Periods, and Response to Pave Tech's Motion to Quash and for Protective Order. I have personal knowledge of the facts set forth herein and can testify competently hereto.

2. At the February 23 and 24th depositions of Steven Jones and Bob Cramer, I told Pave Tech's attorney that Caterpillar intended to send Pave Tech a settlement proposal after receiving and reviewing the deposition transcripts. Moreover, Pave Tech's counsel indicated that he did not want to discuss settlement until had had a chance to review the deposition transcripts. Caterpillar did not receive the deposition transcripts until well into March.



3. I also told Pave Tech's counsel at the February 23 and 24th depositions that Caterpillar intended to take the depositions of Glenn Wrobeleski and Dale Sopkowiak. Both of these witnesses were identified during the depositions as people who had direct contact via telephone at trade shows with consumers who possibly could be confused between the Caterpillar Marks and the PAVERCAT mark.

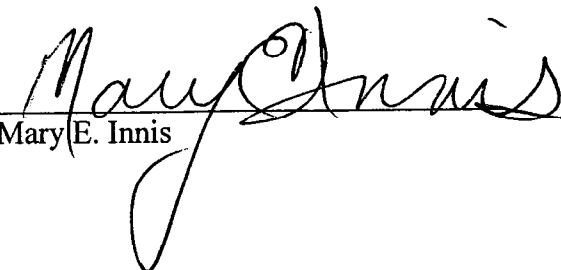
4. On April 21, 2004 – two weeks before the end of discovery and a year after discovery opened– I received Pave Tech's first written notice that it intended to take any depositions. On that day, I received the deposition notices for Gene Bolmarcich in Illinois, for Terry Sharpe in Minnesota, and a 30(b)(6) witness.

5. Because of the breadth of the twenty-eight 30(b)(6) deposition topics, multiple deponents would have had to identify multiple witnesses to cover all of these topics. It is very possible that not all of these witnesses would be located in Peoria. In fact, one of the witnesses may be located in Texas.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on the 1st day of June, 2004.

Date: June 1, 2004


Mary E. Innis

D

-----Original Message-----

From: Rebecca Bishop [mailto:rbishop@alteralaw.com]
Sent: Wed Apr 21 11:40:51 2004
To: Mary Innis; Nerissa McGinn
Cc: Rebecca Bishop; minnlaw@mn.rr.com
Subject: Caterpellar v. Pave Tech Cancellation (Our Ref. 01000.0319-US-TA)

Ms. Innis and Ms. Coyle McGinn,

Good afternoon. Please find attached and served on you three Notices of Deposition by Pave Tech, Inc. in connection with the above-identified cancellation matter. I am also sending a copy via U.S. mail today. As stated in the notices, Pave Tech is open to discussing alterations in the deposition times and places, but did attempt to notice the deponents in the jurisdiction in which, to the best of our knowledge, they reside.

I intend to call one of you this afternoon to introduce myself and to discuss the notices further. If you have any questions before then, please do not hesitate to contact me at the information below.

Very truly yours,
Rebecca Bishop

ALTERA LAW GROUP
6500 City West Parkway
Suite 100
Eden Prairie, MN 55344-7704
952.253.4100 (direct)
952.912.0574 (fax)
RBishop@Alteralaw.com
www.Alteralaw.com

This message is meant to be read only by the recipient(s) listed above, and may contain confidential information and/or information protected by an ATTORNEY/CLIENT PRIVILEGE. If you have received this message in error, please delete all copies of this message and contact us at 952-253-4100. Thank you.



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,)	
)	
Petitioner,)	
v.)	Cancellation No. 41,776
)	
PAVE TECH, INC.,)	
)	
Registrant.)	

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DECLARATION OF NERISSA COYLE MCGINN
IN SUPPORT OF CATERPILLAR'S
MOTION FOR EXTENSION

1. I am an attorney with Loeb & Loeb LLP, 200 South Wacker, Suite 3100, Chicago, Illinois 60606, counsel of Petitioner, Caterpillar Inc. ("Caterpillar"). I am one of the lawyers primarily responsible for the above captioned matter on Caterpillar's behalf. In such capacity, I submit this affidavit in support of Caterpillar's Motion for Extension of the Discovery and Testimony Periods. I have personal knowledge of the facts set forth herein and can testify competently hereto.

2. On April 21, 2004, Pave Tech served three notices of depositions on Caterpillar for the last three days before discovery closes on May 5, 2004. The depositions noticed were for the following persons: Terry G. Sharp on May 3, 2004 in Eden Prairie, Minnesota; Gene Bolmarcich on May 4, 2004 in Peoria, Illinois, and Caterpillar's 30(b)(6) witnesses on May 5, 2004 in Peoria, Illinois. Exhibit A, Pave Tech Notices of Depositions. In the e-mail accompanying the notices of depositions, Pave Tech's counsel indicated that Pave Tech was open to "alterations in the deposition times and places."

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3. On April 22nd, Caterpillar's counsel responded to Pave Tech's e-mail stating that both of Caterpillar's attorneys would be out of the office from May 1st to May 7th and that the depositions would have to be rescheduled. In that same e-mail, Caterpillar's counsel stated the parties "would need to agree to extend the discovery period to schedule the depositions and further depositions on our end."

4. On April 27, 2004, Caterpillar's counsel spoke with Pave Tech's attorney, Rebecca Bishop, regarding an extension of the discovery schedule, the additional depositions that Caterpillar intended to take, and a potential settlement. During that conversation, Caterpillar's counsel requested a 60 day extension of the discovery deadline for both of the parties to take the depositions they had requested. Ms. Bishop indicated that Pave Tech would be willing to agree to a 30 day extension of discovery but that she would have to ask her client before she could agree to a 60 day extension of discovery.

5. On April 28, 2004, Caterpillar sent Pave Tech a letter with a settlement proposal. In addition to the settlement proposal, the letter also attached two notices of depositions for Dale Sapkowiak on May 14, 2004 and Glen Wroblewski on May 12, 2004. These were the two depositions Caterpillar had referred to in its April 22, 2003 e-mail.

6. On April 29, 2004, Pave Tech's attorney reneged on its previous agreements to extend the discovery period and to reschedule the May 3-5 depositions. Pave Tech's counsel suddenly insisted on taking the depositions on May 3-5 unless Caterpillar would agree to a "unilateral" extension of time. The terms of this "unilateral" extension of time would allow Pave Tech to take its three depositions after the close of

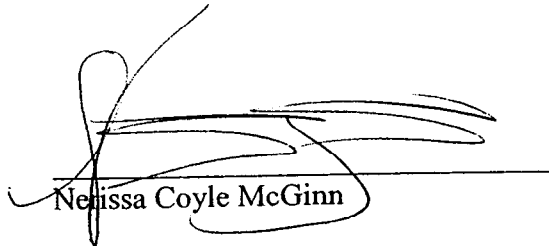
discovery, but would preclude Caterpillar from taking the two depositions that it had noticed up during the discovery period.

7. Caterpillar argued that this proposal directly violated the oral agreement between the parties discussed on April 27th. Not surprisingly, Pave Tech's attorney denied that she had agreed to an extension of time claiming that she had stated that "I do not have a problem with the 30 day extension", not that her client does not have problem with the 30 day extension. Pave Tech did not deny that it had previously stated that it would be willing to reschedule with depositions.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on the 30th day of April, 2004.

Date: April 30, 2004



Nerissa Coyle McGinn

LOEB & LOEB LLP

A LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

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CHICAGO, IL 60606-5867

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April 28, 2004

VIA FACSIMILE & U.S. MAIL

Michael J. O'Loughlin
Michael J. O'Loughlin & Associates, P.A.
400 South 4th Street
1012 Grain Exchange Building
Minneapolis, MN 55415

Rebecca Jo Bishop
Altera Law Group
6500 City West Parkway
Suite 100
Eden Prairie, MN 55322

Re: Caterpillar Inc. v. Pave Tech, Inc.

Dear Michael:

After reviewing the deposition testimony of Stephen Jones and Robert Cramer, Caterpillar believes that the deposition testimony establishes that there is a likelihood of confusion between the Caterpillar Marks and Pave Tech's PAVERCAT mark. The most damning of the evidence against Pave Tech is the fact that one of Pave Tech's 30(b)(6) witnesses admitted that there is a possibility of confusion between the two marks. In his deposition, Bob Cramer admitted that he believed there was a possibility that attendees at trade shows might mistakenly believe that the PAVERCAT product was somehow associated with Caterpillar. Cramer, p. 34-35.

In addition to this admission, Caterpillar also believes the deposition testimony demonstrates a likelihood of confusion between the PAVERCAT and the Caterpillar Marks because the marks, the products sold in connection with the marks, and the markets in which the products are sold are confusingly similar. First, the addition of the descriptor "paver" does not sufficiently distinguish the PAVERCAT mark from the Caterpillar Marks. The only difference between the CAT and PAVERCAT marks is the word "paver" which Pave Tech has admitted is generic for the type of brick used in segmental paving. Jones, p. 11, 16-17; Cramer, p. 47. The Board repeatedly has ruled that the combination of a descriptive or generic term such as "paver" with a famous mark such as the CAT mark does not adequately distinguish the challenged mark from the CAT mark. *Caterpillar Inc. v. Gehl Company*, 177 U.S.P.Q. 343 (TTAB 1973) (holding that Caterpillar's mark CAT and respondent's mark HYDRACAT were

LOS ANGELES
NEW YORK
CHICAGO
NASHVILLE



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confusingly similar); *Caterpillar v. Electric Carrier Corp.*, 201 U.S.P.Q. 778 (T.T.A.B. 1978) (sustaining Caterpillar's opposition against applicant's mark ELECTRICAT).

Moreover, Pave Tech has a family of marks which combine two generic terms such as the following:

1. PAVEREXTRACTOR – a tool used to extract pavers
2. PAVERCART – a cart used to transport pavers
3. PAVERADJUSTER – a tool used to adjust pavers.

Similar to Pave Tech's other marks, Caterpillar believes that the PAVERCAT mark is a combination of two terms being used descriptively. As admitted by Pave Tech, the term "paver" is descriptive of the type of bricks used in the segmental paving industry. Moreover, both Stephen Jones and Bob Cramer admitted that CAT is a well-known or famous brand name for heavy equipment. Cramer, p. 48; Jones, p. 42-43. Therefore, Pave Tech is using the term "cat" to intentionally trade on the goodwill of the Caterpillar Marks in connection with heavy equipment.

Second, the PAVERCAT and Caterpillar products are confusingly similar. Despite the fact that Pave Tech attempted to distinguish the PAVERCAT product from a Caterpillar skid steer loader, Bob Cramer admitted during his deposition that both a skid steer loader and a PAVERCAT perform some of the same functions – back dragging and moving pavers. Cramer, p. 47. Moreover, Pave Tech admitted that Pave Tech has used and continues to use skid steer loaders instead of the PAVERCAT product for installing segmental pavers and in demonstrations. Jones, p. 75; Cramer, p. 9-18.

Third, the PAVERCAT and Caterpillar products are sold in the same market. Pave Tech attempted to distinguish Caterpillar markets by claiming that the target market for the PAVERCAT is the small, niche segmental paver market. However, as admitted by Stephen Jones, this niche market is a subset of the general construction and landscaping markets – both of which are Caterpillar target markets. Jones, p. 71-72. In addition to this admission, it is clear from Bob Cramer's testimony that Caterpillar and Pave Tech's marketing efforts overlap. Bob Cramer, Pave Tech's

Michael J. O'Loughlin
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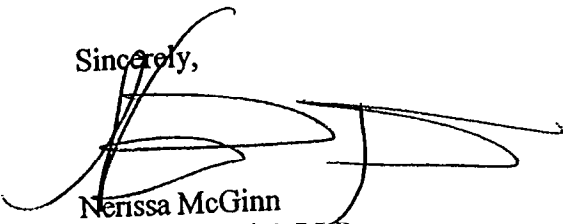
30(b)(6) witness on trade shows, admitted that Caterpillar and Pave Tech attended the same trade shows. Cramer, p. 34. The trade shows which both Caterpillar and Pave Tech attended include the following: the World of Concrete 2000 (which is the first trade show where Pave Tech first introduced the PAVERCAT); the World of Concrete 2001, the Green Industry Expo 2002, and the Green Industry Expo 2003. Cramer, p. 9-18, 23-24, 33, 39-40. Therefore, Caterpillar and Pave Tech's markets overlap.

Because the deposition testimony strongly supports Caterpillar's arguments that there is a likelihood of confusion between the marks, Caterpillar suggests settling this matter. Caterpillar has attached a proposed settlement agreement to this letter as Exhibit 1.

Caterpillar believes settling this matter before either party incurs any additional discovery expenses will be best for both parties. In addition, Caterpillar believes that settlement in this action is particularly attractive for Pave Tech since it is no longer using the PAVERCAT mark and has no plans to use the PAVERCAT mark in the future. However, Caterpillar would be willing to discuss an appropriate phase out period if necessary.

If Pave Tech does not agree to the terms of the attached settlement agreement, Caterpillar intends to aggressively proceed with the outstanding discovery issues. This would include deposing both Glenn Wroblewski and Dale Sopkowiak. We have attached notices of deposition as Exhibit 2 for both of these witnesses with tentative dates for the depositions that we can discuss in the future. Caterpillar would like to conduct these depositions in early May if Pave Tech does not agree to settle this matter by that time.

Sincerely,



Nerissa McGinn
for Loeb & Loeb LLP

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SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into between Caterpillar Inc. ("Caterpillar"), a Delaware corporation with its principal place of business in Peoria, Illinois and Pave Tech, Inc. ("Pave Tech"), a Minnesota corporation with its principal place of business in Prior Lake, Minnesota. This Agreement is effective as of the date of the last required signature below (the "Effective Date").

WHEREAS, Caterpillar is a Delaware corporation with business operations in many areas, including the development, manufacture, distribution, marketing and sale of earthmoving and construction equipment, repair and maintenance services thereof, and the distribution through licensees and otherwise of a wide variety of licensed merchandise including casual clothing, and promotional items, such as note pads, stationary portfolios, pencils, and pens.

WHEREAS, Caterpillar owns the CATERPILLAR and CAT marks and the **CATERPILLAR** and **CAT** design marks, for a variety of goods and services, including as a trademark for heavy equipment (the "Caterpillar Marks") and owns registrations for the marks in the United States Patent and Trademark Office, including U.S. Registration Nos. 277,416, 564,272, 1,579,437, and 2,448,848.

WHEREAS, Pave Tech is a Minnesota corporation located in Prior Lake, Minnesota.

WHEREAS, in 2000, subsequent to Caterpillar's use of the Caterpillar Marks,

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Pave Tech adopted and began using the mark PAVERCAT in connection with the sale of machines and machine parts used to aid in the installation of segmental pavers.

WHEREAS, on January 28, 2000, Pave Tech filed an application to register the mark PAVERCAT for "machines and machine parts used to aid in the installation of segmental pavers." The application matured to registration on February 4, 2003.

WHEREAS, Caterpillar has objected to Pave Tech's use and petitioned to cancel Pave Tech's PAVERCAT registration (Reg. No. 2,684,138); and

WHEREAS, the parties desire to resolve and settle Caterpillar's objections and Cancellation No. 92,041,776.

NOW, THEREFORE, in consideration of the foregoing, the covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which the parties hereby accept and acknowledge, the parties agree as follows:

1. Simultaneously with its execution of this Agreement, Pave Tech will execute the attached Surrender for Cancellation in the form attached hereto as Exhibit A and thereby irrevocably abandons its rights in and to Federal Registration No. 2,684,138 for the PAVERCAT mark together with the goodwill symbolized by and associated with the mark.

2. As of the Effective Date of this Agreement, Pave Tech shall permanently cease all use of PAVERCAT and shall not use or attempt to register any name or mark that a) is an imitation or simulation of any of Caterpillar's trademarks; b) includes the

word "CAT" or "KAT" or c) is likely to dilute the distinctiveness of any of the Caterpillar trademark or tarnish the goodwill associated with any of them.

3. Within seven (7) days after the Effective Date, Pave Tech shall supply Caterpillar's counsel all materials that bear the PAVERCAT mark for destruction and execute the affidavit attached as Exhibit B.

4. Each party shall bear its own costs and attorneys' fees incurred with respect to this action and with respect to this agreement except as described in Paragraph 12.

5. Waiver of any breach of this Agreement shall be ineffective unless in writing and signed by the Party having waived compliance and shall not be considered a waiver of any other breach.

6. This Agreement, along with its attachments, represents the entire understanding of the Parties with respect to the subjects covered by the Agreement, replaces any prior written or oral agreements, and may not be changed or modified except by a writing signed by both Parties.

7. This Agreement shall bind the Parties, their officers, directors, representatives, licensees, agents, successors, assigns, affiliates, subsidiaries, divisions, shareholders, and all parties in active concert of participation with any of them, and is effective worldwide.

8. Pave Tech shall maintain the terms of this Agreement and the circumstances leading up to and surrounding this Agreement in confidence and, except as

necessary to comply with a court order to secure legal advice, shall not disclose those terms and circumstances to others, without Caterpillar's prior, written consent.

9. The provisions of this Agreement are severable. If any provision of this Agreement is held invalid, illegal, or unenforceable, the remainder of the Agreement shall remain in full force and effect, provided the essential purposes of the Agreement are maintained.

10. The Agreement was negotiated and reviewed by each party's legal counsel and there will be no presumption for or against any party on the grounds that another party prepared the Agreement.

11. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Illinois without regard to choice of law principles.

12. In any action to enforce this Agreement, the prevailing Party shall be entitled to recover its actual attorneys' fees and costs in addition to any other remedy to which it is entitled.

13. This Agreement may be executed in counterparts. Signatures on separate originals shall constitute and be of the same effect as signatures on the same original.

14. The undersigned warrant that they have the authority to sign this Agreement on behalf of the Party for whom he or she has signed.

CATERPILLAR INC.

By: _____

Date: _____

Name: _____

Title: _____

PAVE TECH, INC.

By: _____

Date: _____

Name: _____

Title: _____

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

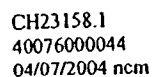
Registrant.

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Pursuant to 37 C.F.R. 2.172, Respondent hereby surrenders for cancellation United States Registration No. 2,684,138 for all classes. Attached as Exhibit A is the original certificate of registration.

PAVE TECH, INC.

By: Michael J. O'Loughlin
Michael J. O'Loughlin
& Associates P.A.
400 South 4th Street
1012 Grain Exchange Building
Minneapolis, MN 55415
Tel. (612) 332-0351



In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

Registrant.

Cancellation No. 41,776

1. My name is _____. I work for Pave Tech, Inc. ("Pave Tech") which is located in Prior Lake, Minnesota. I have personal knowledge of the facts set forth herein and can testify competently hereto.

2. Caterpillar, Inc. ("Caterpillar") and Pave Tech have agreed to resolve and settle Caterpillar's objections to Pave Tech's use of the PAVERCAT mark and Cancellation No. 41,766. Attached as Exhibit 1 is a copy of the signed Settlement Agreement between Caterpillar and Pave Tech.

3. Pave Tech has complied with Paragraph 1 of the attached Settlement Agreement by executing the Surrender of Cancellation attached as Exhibit A to the Settlement Agreement and thereby irrevocably abandoning its rights in and to Federal Registration No. 2,684,138, for the PAVERCAT Mark together with the goodwill symbolized by and associated with the mark.

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EXHIBIT

B

4. Pave Tech has complied with Paragraph 2 of the attached Settlement Agreement by permanently ceasing all use of the PAVERCAT mark.

5. Pave Tech has complied with Paragraph 3 of the attached Settlement Agreement by supplying to Caterpillar's counsel all materials that bear the PAVERCAT mark for destruction and by sending Caterpillar's counsel a copy of this executed affidavit.

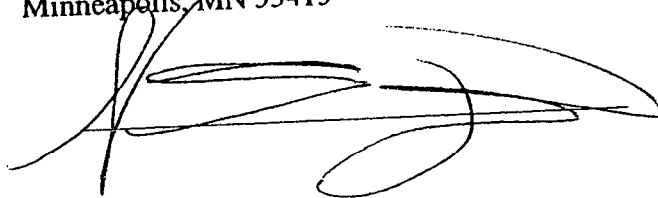
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on the ____th of April, 2004.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that true and correct copy of the foregoing
AMENDED NOTICE OF DEPOSITION was served via facsimile and U.S. Mail on April 28,
2004 to the following counsel of record:

Michael J. O'Loughlin
Michael J. O'Loughlin & Associates, P.A.
1012 Grain Exchange Building
400 South 4th Street
Minneapolis, MN 55415

A handwritten signature in black ink, appearing to be "Michael J. O'Loughlin", written over the printed name and address.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,

Petitioner,

v.

PAVE TECH, INC.,

Registrant.

Cancellation No. 41,776

NOTICE OF DEPOSITION

TO: Michael J. O'Loughlin
Michael J. O'Loughlin & Associates, P.A.
1012 Grain Exchange Building
400 South 4th Street
Minneapolis, MN 55415

On Wednesday, May 12, 2004, beginning at 9:30 am, Petitioner, Caterpillar Inc., will depose the person identified below before a court reporter or other person qualified to administer oaths. The depositions will take place at Brown and James Reporting, 312 E. Wisconsin Avenue, Suite 608, Milwaukee, WI 53202 and continue until completed. The deposition shall be recorded by means chosen by Petitioner. The deponent shall be the following:

1. Glen Wroblewski

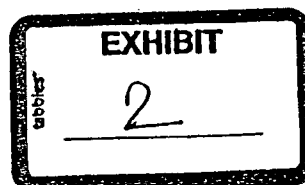
Dated: April 28, 2004

LOEB & LOEB LLP

By:

Mary E. Innis
Nerissa Coyle McGinn
200 South Wacker Drive, Suite 3100
Chicago, Illinois 60606
Telephone: (312) 674-4780
Facsimile: (312) 674-4779

Attorneys for Petitioner



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 2,684,138: PAVERCAT
Registered on the Principal Register on February 4, 2003, in International Class 7

CATERPILLAR INC.,

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v.

PAVE TECH, INC.,

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Cancellation No. 41,776

NOTICE OF DEPOSITION

TO: Michael J. O'Loughlin
Michael J. O'Loughlin & Associates, P.A.
1012 Grain Exchange Building
400 South 4th Street
Minneapolis, MN 55415

On Friday, May 14, 2004, beginning at 9:30 am, Petitioner, Caterpillar Inc., will depose the person identified below before a court reporter or other person qualified to administer oaths. The depositions will take place at Lindquist & Vennum P.L.L.P., 4200 IDS Center, 80 South 8th Street, Minneapolis, MN 55402 and continue until completed. The deposition shall be recorded by means chosen by Petitioner. The deponent shall be the following:

1. Dale Sapkowiak

Dated: April 28, 2004

LOEB & LOEB LLP

By: _____

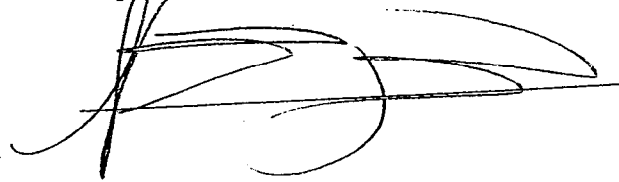
Mary E. Innis
Nerissa Coyle McGinn
200 South Wacker Drive, Suite 3100
Chicago, Illinois 60606
Telephone: (312) 674-4780
Facsimile: (312) 674-4779

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that true and correct copy of the foregoing
AMENDED NOTICE OF DEPOSITION was served via facsimile and U.S. Mail on April 28,
2004 to the following counsel of record:

Michael J. O'Loughlin
Michael J. O'Loughlin & Associates, P.A.
1012 Grain Exchange Building
400 South 4th Street
Minneapolis, MN 55415

A handwritten signature in black ink, appearing to be 'M. O'Loughlin', written over the printed name and address.